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CHUNG KHIAW BANK LTD.

v.

LAU AH YEN & ANOR.

HIGH COURT MALAYA, PULAU PINANG

WAN ADNAN J

b

[ORIGINATING SUMMONS NO. 31-375-88]

4 MARCH 1989

LAND LAW: *Charge - Order of sale by Land Administrator - Public auction abortive - Agreement to sell land by private treaty - Purchase price not sufficient to repay chargee - Court approval not granted.*

c

The plaintiffs/chargees and applicants/interveners made an application to hear further arguments pursuant to O. 56 r. 2(2) of the Rules of the High Court 1980. The interveners' application to be added as a party had been dismissed. The defendants'/chargors' application for the approval of the sale of piece of land by private treaty had been allowed but the plaintiffs had not objected to the application. The plaintiffs' application to approve another sale by private treaty of the said land to the applicants/interveners had been dismissed upon the plaintiffs' request. The public auction which had been held in respect of the said land before the applications were made was abortive. The auctions had been held pursuant to an order of sale by the Land Administrator under the National Land Code, in respect of a charge.

*d***Held:***e*

The Court could allow the sale of the said land by private treaty pursuant to s. 266 of the National Land Code if it was satisfied that the proceeds of sale were sufficient to satisfy the amount due to the chargee. As the purchase price which was offered was less than the amount due, the defendants' application was dismissed. The plaintiffs' application had already been dismissed in chambers. Defendants' application dismissed.

[Application dismissed.]

*f***Cases referred to:**

The Chartered Bank v. Packiri Maideen & Anor. [1963] MLJ 276

Collector of Land Revenue Kota Bharu v. Yusoff b. Yunus [1977] 2 MLJ 53

Legislation referred to:

National Land Code 1965, ss. 55, 256, 259(2)(c), 260, 261, 263, 265(2), (3)(c), 266 (1)

Rules of the High Court 1980, O. 56 r. 2(2)

g

For the applicants/interveners - Charles Rajah; M/s. Charles Rajah & Co., J. Balan; M/s. J. Balan & Co.

For the defendants - Annamalai; M/s. Annamalai & Co.

For the plaintiffs - Tan Hiang Joo (in chambers) & Lim Seang Lee (in open Court); M/s. Cheong Wai Meng & Van Buerle

*h***JUDGMENT****Wan Adnan J:***i*

The defendants are the registered proprietors of the properties known as lots No. 649 and 650 Mukim Sungei Seluang Daerah Kulim, Kedah held under SPK 4962 and 4963 (the properties). On 24 August 1983 they charged the properties in favour of the plaintiffs *vide* charge presentation No. 642/83 Jilid 23 Folio 6 as security for a loan of RM350,000. The

properties are held under Land Office title. Upon breach by the defendants of the provisions of the charge, the plaintiffs applied to the Land Administrator Kulim for an order of sale under s. 260 of the National Land Code. On 14 March 1987 the said Land Administrator ordered that the properties be sold by public auction on 8 June 1987. The reserve price was fixed at RM200,000. There was no bid at the sale.

a

On 25 April 1988 the plaintiffs entered into an agreement with Lee Keng Huah and Khor Lye Seng (the purchasers) whereby the plaintiffs had agreed to sell the properties to the purchasers at the price of RM200,000 subject to the approval of the High Court. Enclosure (1) is the plaintiffs' application for the said approval. The defendant entered appearance. The defendants by encl. (9) also applied for leave to enter into a sale and purchase agreement for the sale of the properties to one Muniandy s/o Pachiappan or his nominee at the price of RM205,000.

b

Then, the purchasers came into the picture. By encl. (11) they applied to be allowed to intervene and be made a party and for the order that the plaintiffs be allowed to sell the properties to them in accordance with the agreement dated 25 April 1988. In their affidavit they said they were now willing to pay RM207,000 for the properties.

c

All the three applications came before me on 20 November 1988. During the hearing I intimated to Counsel that firstly, the Court might not have the power to order the sale by private treaty and secondly, even if the Court had the power it would not be appropriate for me to allow it in the circumstances of the case. I would not allow the proceeding before me to be turned into an auction. They then asked for a short adjournment.

d

On 7 December 1988 the parties were before me again. They wanted to proceed with their applications. By the affidavit affirmed on 6 December 1988 (encl. 19) the defendants said that Muniandy s/o Pachiappan had now agreed to pay RM210,000 for the properties. It became very obvious to me that the intending purchasers were out bidding each other, something which should be happening only at an auction.

e

I first dealt with the purchasers' application to intervene in encl. (11). I dismissed the application. Their purpose to be added as a party was merely to support the plaintiffs' application. They had entered into an agreement with the plaintiffs and the plaintiffs' application was for leave to carry into effect the said agreement. Their interest in the subject matter is not sufficient to entitle them to be added as a party. Their interests are already before the Court through the plaintiffs' application.

f

I then proceeded to deal with the plaintiffs' application (encl. 1) and the defendants' application (encl. 9). I was surprised when Counsel for the plaintiffs then requested me to dismiss the plaintiffs' application and offered no objection to the defendants' application. Although I had earlier intended to dismiss both applications so that the intending purchasers could make their bids at an auction by the District Land Administrator I allowed the defendants' application that the properties be sold by private treaty at the price of RM210,000 to Muniandy s/o Pachiappan or his nominee.

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Upon requests, made pursuant to O. 56 r. 2(2) of the High Court Rules, by the purchasers as well as the plaintiffs, I heard further arguments in open Court on 14 January 1989.

h

After hearing further arguments I allowed the purchasers' application to intervene in encl. (11) and I dismissed the defendants' application in encl. (9).

i

a I allowed the purchasers to intervene because the plaintiffs had shown that they had not been acting in the interest of the purchasers. They had requested the Court to dismiss their application. In the circumstances it would not be just not to allow the purchasers an opportunity of being heard.

b Counsel for the defendant had raised as a preliminary objection that the Court should not re-open the case because the order made on the defendants' application (encl. 9) was in fact a consent order. I did not agree to this. An order does not become a consent order merely because one or the other of the parties does not object or merely because he submits to it being made. A consent order is one which embodies the true and actual consent of the parties. In this case the plaintiffs merely did not object.

c Before me in open Court the purchasers and the plaintiffs took a stand different from their earlier stand. Their contention now was that the Court did not have the power to order sale by private treaty and that the defendants' application should be dismissed.

The Land Administrator had made the order of sale by public auction under s. 263 of the National Land code after holding an enquiry under s. 261.

Section 265(2) and (3) of the Code states as follows:

- d** 265. Procedure at sale
- (1)
- (2) If at the sale no bid is received at or above the reserve price, the land or lease in question shall be withdrawn from the sale, and the Land Administrator shall direct that it be put up for auction on a subsequent date, either at the same or at a reduced reserve price, and shall give such notice of the subsequent sale as he may consider appropriate.
- e** (3) If at the sale no bid is received at or above the reserve price:
- (a) the land or lease shall be withdrawn from the sale;
- (b) the Land Administrator shall refer the matter to the Court; and
- (c) the Court may substitute for the order of the Land Administrator an order for sale
- f** under s. 256, or make such other order as it may think just.

Sub-section (2) clearly provides that in the absence of any bid at or above the reserve price land must be withdrawn from the sale. The Land Administrator is then required to put up the land for a second auction. If at the second auction still no bid is received, then by virtue of sub-section (3) the Land Administrator is required to refer the matter to the High Court.

g In *The Chartered Bank v. Packiri Maideen & Anor.* [1963] MLJ 276 Gill J (as he then was) said:

It is to be observed that ss. 149 to 154 of the Land Code contemplate the sale of land by public auction. It is of course open to the parties to sell the lands by private treaty before any proceedings are commenced in Court, but once such proceedings are commenced the lands have to be sold by public auction.

h The provisions of ss. 149 to 154 of the Land Code (Cap. 138) are similar to the provisions of ss. 256 to 259 of the National Land Code (procedure in respect of lands held under Registry title) and the provisions of ss. 141 to 148 of the Land Code are similar to the provisions of ss. 260 to 265 of the National Land Code (procedure in respect of lands held under Land Office Title). I do agree that the sale contemplated in Chapter 3 Part Sixteen of the National

i Land Code (ss. 256 to 259 and ss. 260 to 265 are in this Chapter) is a sale by public auction.

The Court cannot order any sale by private treaty. It is my view that the Court has no power to order sale by private treaty even under s. 265(3)(c) of the National Land Code. "... to make such other order as it may think just" to my mind does not include the power to order sale by private treaty. Under this subsection the Court may for example direct the Land Administrator to put up the land for sale by public auction for the third time at a reduced reserve price. (See *Collector of Land Revenue Kota Bharu v. Yusoff b. Yunus* [1977] 2 MLJ 53. This will be consistent with the provisions of s. 259(2)(c) wherein no power is reserved to the Court "to make such other order as it may think just." It is my view that under this sub-section when there is no bid at the second auction the Court may order the land to be put up for auction for the third time. In fact there is no limit as to the number of times the land can be put up for auction and for each time the Court may reduce the reserve price.

However this does not mean that whenever there is an order for sale of land by public auction either by order of Court under s. 256 or by the Land Administrator under s. 263 the land in question cannot in any circumstances be sold by private treaty. In my view the proposition in *Packiri Maideen's* case that "... but once proceedings are commenced the lands have to be sold by public auction" is no longer valid in view of the provisions of s. 266(1) of the National Land Code which states as follows:

266. Right of chargor to tender payment at any time before sale.

- (1) Any chargor against whom an order for sale has been made under this Chapter may, at any time before the conclusion of the sale, tender the amounts specified in sub-section (2) to the Registrar of the Court or, as the case may be, Land Administrator (or, if the tender is made on the day fixed for the sale, to the officer having the direction thereof), and the order shall thereupon cease to have effect.

There was no similar provision in the Land Code (Cap. 138). In my view the Court may allow a chargor of any land to sell the land in question by private treaty in circumstances where the Court is satisfied that the proceeds of such sale are not less than the amount due to the chargee under the charge and that the chargee will be duly paid full out of the said proceeds.

In this case the defendants' application is to sell the properties at the purchase price of RM210,000 when the amount still due under the charge was RM524,660.91 as at 14 April 1987.

I therefore dismissed the defendants' application. The plaintiffs' application had already been dismissed in chambers.

Also found at [1989] 1 CLJ 1065

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